No. 405

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 405

JOHN W. TURNER, JR.,

Appellant,

vs.

WARREN E. WRIGHT, TREASURER OF THE STATE OF ILLINOIS AND RICHARD J. LYONS, DIRECTOR OF THE DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS,

Appellees.

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS

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In our jurisdictional statement we said that the Illinois use tax act was unique and differed from use tax acts of all other states in that in Illinois (1) both the retailers' tax and the use tax are always rigidly due upon sales within the state, without exemption from the use tax of sales within the state as in the case of some state use tax acts or with the use tax only due where the retailers' tax is not paid as in the remaining states and (2) Illinois retailers keep as their own the taxes collected on Illinois purchases. That has not been challenged by appellees in their motion.

In Division "A" of their motion, appellees have defended Sec. 9 of the act with regard to the retention of the tax by the retailers; and in Division "B" they have defended

Sec. 3 of the act with regard to the exemption in question. We shall reply in the same order. However, appellees have argued in Division "A" that the use tax act is complementary to the retailers' act. That question has no bearing upon the validity of Sec. 9. It relates to the validity of Sec. 3. We shall, therefore, reply upon that question in Division "B" when discussing the validity of Sec. 3.

A

SEC. 9 OF THE USE TAX ACT IS INVALID

The essence of appellees' argument to justify the making of a gift of the use tax to Illinois retailers is that it "*is aimed at preventing two taxes from reaching the State Treasury.*" (Italics supplied). (Motion p. 19). The argument poses the issue instead of answering it. Without question the provision is aimed at preventing two taxes from entering the state treasury. That is the issue, not its answer. Had the act provided for the payment of the use tax into the state treasury we would not be objecting, as we are, that it makes a gift of public funds for a private purpose. It is because the act is "aimed at preventing two taxes from reaching the state treasury" that a resultant violation of the Fourteenth Amendment occurs in taking private property of use tax payers without due process of law. For appellees to thus justify the gift of the tax, by stating the issue instead of answering it, strips it of any justification at all.

In our jurisdictional statement we pointed out that the Illinois retailers' act is not a sales tax but an occupation tax upon retailers; that the sole duty of paying the tax rests upon retailers; and that they are not agents of the state to collect their own tax from purchasers (Jur. Stat. 17). As a consequence of the operation of Sec. 9 of the use tax act, an Illinois retailer, upon paying his tax (*which is levied upon him alone and not upon his purchaser*) is en-

titled to keep as his own the use tax which he has collected from his purchasers. The use tax is therefore levied on Illinois purchasers solely for the purpose of permitting Illinois retailers to reimburse themselves on account of their own tax obligations.

This provision whereby money in the form of taxes is taken from the pockets of Illinois purchasers and placed in the pockets of Illinois retailers is regarded by appellees in their motion as something purely "mechanical." Appellees state that when the "true purpose and function" of the provision in question is "understood" it is apparent that "the object of that purpose is a public purpose" (Appellees' motion p. 18). Appellees then stop short without a word to explain or support that the purpose is "public."

The only conceivable purpose of the provision in question is to levy a tax upon one class (retail purchasers in Illinois) to reimburse another class (Illinois retailers). A tax is a levy for the support of government (*United States* v. *Butler*, 297 U.S. 1-61, 1935). A tax has never been thought to mean an appropriation from one group for the benefit of another (*ibid.*). Whether a tax is for a public purpose has regard to the use to be made of the revenue derived from the tax. (*A. Magnano Company* v. *Hamilton*, 292 U.S. 40-43, 1934). The tax upon Illinois purchasers does not have the barest pretense of a public purpose. It is levied purely for the purpose of directly reimbursing a class of tax payers on account of their tax obligations. The tax levied does not enter the Illinois treasury and is not for a governmental purpose of any kind any more than were it a tax levied to pay the retailers' bank obligations or wholesale obligations.

If such a tax is for a public purpose, then so too would be a tax upon tenants to reimburse landlords for their real estate taxes or any other conceivable tax upon one class of taxpayers to reimburse another class on account of their

tax obligations or any other obligations they might have. If the Illinois legislature does not want its retailers to pay the tax it has levied upon them it can repeal it; but it cannot leave the tax in force and levy another tax for the purpose of furnishing retailers with the funds to reimburse themselves on account of the tax levied against them.

In seeking escape from their problem, appellees state that a retailer "still pays the retailer's occupation tax to the State; but instead of passing on that tax to the purchaser as most retailers used to do," the retailer now reimburses himself for the retailers' tax by retaining the use tax. Appellees should be well aware that a retailer does not have any legal right to shift his own retailers' tax to his customers, and his customers are under no legal obligation to pay it (*People's Drug Shop* v. *Maysey*, 384 Ill. 283, 1943. "Unambiguous provisions of the Retailers' Occupation Tax Act proclaim and the decisions of this court uniformly hold, that the tax imposed is upon retailers and not upon consumers and that the sole duty of paying the tax rests upon the former. It follows necessarily that plaintiff was without legal authority to collect from its consumer, the defendant, the challenged item in its invoices representing additional charges for retailers' occupation tax." *ibid.*, p. 287).

We submit that Sec. 9 of the act is an unvarnished appropriation of taxes for a private and non-governmental purpose.

B

SEC. 3 OF THE USE TAX ACT IS INVALID

The Illinois Supreme Court conceded that if the use tax act were not complementary to the retailers' act, the exemption given by Sec. 3 would be without reasonable basis (See footnote p. 20 Jur. Stat.). Manifestly it is arbitrary and unreasonable to impose a use tax upon a secretary

who purchases lunch at a restaurant but to impose no tax upon her employer who buys his lunch at his club. Neither is there any reasonable basis for the exemptions that apply to purchasers from any of the other service occupations (Jur. Stat. 20) unless the acts in question are complementary. Therefore, if the use tax act does not complement the retailers' act Sec. 3 must fall.

We argued (Jur. Stat. 22-23) that the use tax act did not "complete" or "supply the deficiency" of the retailers' act for either of the following reasons: (1) It does not merely plug the gap by taxing only out of state purchases that have escaped the retailers' act but introduces a new tax upon Illinois transactions that exists concurrently with the retailers' tax. A tax upon out of state purchases alone would have been a deterrent to Illinois residents making purchases outside the state. (2) The tax upon Illinois transactions is levied solely for the benefit of Illinois retailers who collect it. At tax levied for the private benefit of Illinois retailers destroys any notion that its purpose is to plug the gap and prevent tax evasion by Illinois residents buying outside the state.

The question is not whether the Illinois legislature endeavored to pass an act complementary to the retailers' act as appellees assume. The test is whether the acts are actually complementary. If it were otherwise, then any exemption in any revenue act, no matter how unreasonable, could be sustained by selecting some other revenue act and calling it complementary to that act no matter whether it was or not. Not every tax of a state for the use of its highways "completes" or "makes perfect" every other highway tax it may have. Not every tax of a state upon corporations complements every other tax it may impose upon corporations. To make one tax complementary to another there must not only be a legislative intent but also the complementary nature of the two acts must be realistically present.

In other states use taxes are clearly complementary to the retailers' or sales taxes. Both a use tax and a retailers' or sales tax are not due upon every sale within the state. Neither is the use tax remitted to the retailers of those states. Either an outright exemption is given from the use tax as to purchases made within the state or, in states where no outright exemption is given, the use tax upon local sales is only due when the retailers' or sales tax is not paid (Jur. Stat. 4).

To introduce a use tax upon Illinois purchases (even if it were paid into the state treasury) in addition to the tax upon retailers upon the identical sales and make both taxes due in all events prevents no tax avoidance of the already present retailers' tax; and to then go a step further and levy the use tax upon Illinois purchases solely, as here, for the remission of the proceeds to Illinois retailers neither enriches the state's tax income on account of purchases made outside the state by Illinois residents nor deters them from making such outside purchases, there already being present in the act a use tax as to outside purchases.

Although the substance of what we have just said was fully stated in our jurisdictional statement, appellees' motion has evaded a reply. Appellees state (Motion 10) that "The function of the use tax is to equalize the situation so that there is no legally known tax advantage in buying goods outside Illinois because of the existence of the retailers' occupation tax." In so giving a description of a complementary use tax, appellees have done so correctly. However, they do not and cannot make their description apply to the Illinois use tax act. There would be "no legally known tax advantage" buying outside Illinois if the act had only imposed the tax upon out of state purchases. As we have shown, imposing the tax upon Illinois purchases and remitting the proceeds to Illinois retailers removes any trace that the two acts are complementary.

Being unable to account how a use tax so imposed upon Illinois sales "completes" or "makes perfect" an already existing retailers' tax upon the same transactions, appellees state that it was necessary to impose the tax upon sales both within and without Illinois in order to satisfy the uniformity clause of the Illinois constitution. Whether or not the act in question is complementary to the retailers' act is not to be determined by whether the Illinois constitution would require a tax on sales both within and without the state. *The fact is that the use tax act is not complementary to the retailers' act; and it is not made any more complementary by the reason that it may or may not be in the only form permitted by the uniformity clause of the Illinois constitution.* A non-complementary use tax would not be turned into a complementary one because the Illinois constitution required it to be written in a form not complementary to the retailers' act.

For the reasons we have given, the two acts would not be complementary even though the rates of tax were the same. However, we have pointed out that the rates of tax are not always the same. This occurs where property given in trade is included in computing the purchase price for arriving at the use tax; but in computing the retailers' tax the property given in trade is excluded (Jur. Stat. 23-24). This is strong additional evidence that the two acts are not complementary.

Appellees argue that the foregoing results not from a difference in rate but from the operation of the tax. In adjudicating a tax measure this court is concerned only with its practical operations, not its definitions or the precise form of descriptive words which may be applied to it (*Wisconsin* v. *J. C. Penney Co.*, 311 U.S. 435-441, 1941). Although theoretically the rates of taxes of the retailers' act and use tax act may be the same there is no uniformity of tax. Uniformity in taxation implies equality in the

burden of tax; and the equality of burden cannot exist without uniformity in the mode of assessment as well as in the rate of taxation (*Greene* v. *Louisville and Interurban R.R. Co.*, 244 U.S. 499-515, 1916). Whatever may be the rates provided by the two acts, the fact remains that their operation produces a result as if the rates were not the same.

So far as the use tax is upon purchases made in Illinois, it has neither the purpose nor the efficacy of protecting or complementing the retailers' tax. The latter is fully enforcible and collectible upon Illinois sales without a use tax upon the same sales. No reason can be conceived (and appellees advance none) how the imposition of the use tax upon Illinois sales aids in any manner in the enforcement or collection of the retailers' tax upon the same sales. Neither does the use tax upon Illinois sales aid in the enforcement or collection of the retailers' tax so far as anything that may occur outside the state. A use tax upon Illinois sales is not a deterrent to an Illinois resident to avoid the retailers' act by buying outside the state. A use tax on out of state purchases alone would furnish the deterrent.

Respectfully submitted,

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